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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. [redacted]355

CLAUDE VERNON COOPER, *Petitioner,*

vs.

ELIZABETH D. COOPER, *Respondent.*

BRIEF FOR RESPONDENT

In Opposition to the Petition for Writ of Certiorari to the Court of Appeals of the Commnwealth of Kentucky

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WILLIAM ERNEST FAULKNER,
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GRABER PRINTING CO., ASHLAND, KY.

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I

IN THE

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CLAUDE VERNON COOPER, *Petitioner,*

vs.

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BRIEF FOR RESPONDENT

In Opposition to the Petition for Writ of Certiorari to the Court of Appeals of the Commnwealth of Kentucky

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Elizabeth D. Cooper, in opposition to the petition herein filed by Claude Vernon Cooper for a Writ of Certiorari to the Court of Appeals of Kentucky, respectfully represents:

I.

This was an action in the Circuit Court of Perry County, Kentucky, by Elizabeth D. Cooper against her husband, Claude Vernon Cooper, to recover two tracts of land located in Hazard, Perry County, Kentucky, which was her home, and $100,000 in alimony (Transcript of Record, pp. 2-6). This action was filed on June 15, 1944, and an order of attachment was obtained

and levied upon stock in the Peoples Bank of Hazard, Kentucky. The bank answered that it held subject to the order of the Court 250 shares of stock and dividends in the name of C. V. Cooper (Transcript of Record, pp. 10-11).

Thus, in 1944, the Perry Circuit Court acquired jurisdiction over the Kentucky property which was maintained, and is still maintained.

On September 23, 1944, Cooper filed an answer and a counter-claim for divorce (Transcript of Record, pp. 8-10). Cooper had already, on June 8, 1944, filed an action for divorce in Florida. It was agreed that both cases should proceed, and that evidence taken by either party, in either case, might be filed and made a part of the record in the two cases (Transcript of Record, p. 25). Thus it was agreed that the Florida case for a divorce alone, and the Kentucky case for alimony alone, should be prepared. A large amount of evidence was taken and on May 3, 1946, the Circuit Court of Volusia County, Florida, granted Cooper a divorce (Transcript of Record, pp. 540-541). No reference was made in the decree to alimony or property rights.

Then on June 17, 1946, Cooper filed a supplemental answer setting up the divorce as a defense to the pending action in Kentucky (Transcript of Record, p. 529). The Special Judge of the Perry Circuit Court did not pass on the merits, but dismissed the action (Transcript of Record, p. 589).

Appeal was taken to the Court of Appeals of Kentucky and that Court, on May 26, 1950, reversed the Circuit Court of Perry County holding that the Florida decree granting Cooper a divorce was not conclusive of the right of Mrs. Cooper to recover the real estate claimed by her, and did not preclude Mrs. Cooper from

recovering permanent alimony (Transcript of Record, pp. 593-598). Cooper vs. Cooper, 314 Ky. 413, 234 S.W. (2d) 658.

Upon return of the case to the Perry Circuit Court, a motion was made by counsel for Cooper to limit the additional evidence to the question of alimony, which was sustained (Transcript of Record, p. 607).

Upon completion of the additional testimony, the Circuit Court rendered judgment awarding Mrs. Cooper her home property and $125,000 in alimony (Transcript of Record, pp. 758-761). Cooper prosecuted an appeal to the Court of Appeals from that judgment and on March 21, 1952, that Court reduced the allowance of alimony to $35,000 and the title to the land to a mere life estate (Transcript of Record, pp. 762-768). Cooper vs. Cooper, 248 S.W. (2d) 702 (no official report).

On the first appeal, the Court decided that the Florida decree fixed the marital status of the parties, but did not preclude Mrs. Cooper from obtaining the relief sought by her in the Perry Circuit Court.

The full faith and credit required by the Constitution was respected, the Court saying:

> "In order to give full faith to the Florida decree, we are not required to go as far as the Supreme Court of the United States did in the case of Estin vs. Estin, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, 1 A.L.R. (2d) 1412, wherein it was said:
>
> " 'The result of this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status, and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New

> York in this broken marriage by restricting each state to matters of her dominant concern.' "

In Kentucky an opinion of the Court of Appeals constitutes the law of the case thereafter, binding both the Circuit Court and the Court of Appeals.

Notwithstanding this long established rule, Cooper, on the second appeal, attempted to re-argue the question of the effect of the Florida decree. The Court, in the second opinion, in answer to the contention, said:

> "The appellant seeks to argue again the question of whether the Florida divorce judgment barred Mrs. Cooper's right to claim alimony, but that question was settled on the first appeal and will not be again considered."

Hence it is clear that the question now sought to be reviewed was settled on the first appeal finally and conclusively so far as the Kentucky Courts were concerned. If it was desired to have that question reviewed by this Court, it should have been done within the time allowed after it was decided on the first appeal. It is now too late to invoke the discretion of this Court to review that question.

II.

JURISDICTION.

(a) The judgment of the Court of Appeals of Kentucky disposing for this state of the effect of the Florida decree was rendered on May 26, 1950, and became final after petition for rehearing was denied on December 15, 1950, when the Court's mandate was issued (Transcript of Record, p. 600).

The "law of the case" doctrine in Kentucky is that an opinion of the Court of Appeals is binding and con-

clusive on the Circuit Court and on the Appellate Court as well. West's Kentucky Digest, Appeal and Error, Key Numbers 1097(1) and 1097(2).

Hence it is now too late for Cooper to have a review in this Court of a judgment rendered on May 26, 1950, which passed beyond the control of the State Courts on December 15, 1950.

Bruce vs. Tobin, 245 U. S. 18, 38 S. Ct. 7, 62 L. Ed. 123;

Martinez vs. International Banking Corp., 220 U. S. 214, 55 L. Ed. 438, 31 S. Ct. 408;

Mississippi C. R. Co. vs. Smith, 295 U. S. 718, 79 L. Ed. 1673, 55 S. Ct. 830.

When the State Court has spoken its final word on a federal question, the decision is immediately reviewable, and not afterwards. Tippecanoe County vs. Lucas, 93 U. S. 108, 23 L. Ed. 822; Mower vs. Fletcher, 114 U. S. 127, 29 L. Ed. 117, I S. Ct. 799; Market Street Ry. Co. vs. Railroad Commission of California, 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (Anno 1186).

(b) Kentucky, like every state of the Union, has jurisdiction to determine for itself the liability of property within its limits to seizure under the process of its courts.

Clark vs. Willard, 292 U. S. 112, 78 L. Ed. 1160;

Same case, second appeal, 294 U. S. 210, 79 L. Ed. 865;

Green vs. Buskirk, 5 Wall 307, 18 L. Ed. 599, 7 Wall 13, 19 L. Ed. 109;

Hervey vs. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003;

Security Trust Co. vs. Dodd, 173 U. S. 624, 43 L. Ed. 837, 19 S. Ct. 545.

(c) The Court of Appeals of Kentucky gave full faith and credit to the Florida judgment insofar as it fixed the marital status of the parties and it was required to go no farther.

The right of Kentucky to determine the liability of Cooper to his deserted wife, and to subject the property it held under due process to that liability, was in no way impaired or affected by the Florida decree.

In Pennington vs. Fourth National Bank, 243 U. S. 269, 61 L. Ed. 713, 37 S. Ct. 282, this Court said:

> "The 14th Amendment did not, in guarantying due process of law, abridge the jurisdiction which a state posessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property.
>
> "Indebtedness due from a resident to a non-resident of which bank deposits are an example—is property within the state. Chicago R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1714, 19 S. Ct. 797. It is indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. Harris vs. Balk, 198 U. S. 215, 49 L. Ed. 1023, 25 S. Ct. 625, 3 Ann. Cases 1084. Substituted services on a non-resident by publication furnishes no legal basis for a judgment in personam. Pennoyer vs. Neff, 95 U. S. 714, 24 L. Ed. 565. But garnishment or foreign attachment is a proceeding quasi in rem. Freeman vs. Alderson, 119 U. S. 185, 30 L. Ed. 373, 7 S. Ct. Rep. 165. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercisee of this power.
>
> "It is asserted that these settled principles of law cannot be applied to enforce the obligations of an absent husband to pay alimony without violat-

ing the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim.

"It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the Court. The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt,— that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized. Cases are cited in the margin."

Seizure may be by attachment, garnishment or injunction. In the *Pennington case* the process was injunction. But the most usual form is by attachment (39 A.L.R., Anno., 1387). In this and other States land described in a pleading is sufficiently seized.

Holmes vs. Holmes, 283 Fed. 453;

Rice vs. Kelly, 226 Ky. 347, 10 S.W. (2d) 1112.

It is well established, and indeed unquestioned, that the pendency of an action for divorce in one State does not bar an action for divorce or alimony, or to vindicate the rights of property, in another State.

Nelson on Divorce and Annulment, Vol. 3, p. 429;

Schouler Divorce Manual, p. 213.

The granting of a divorce works no change.

In *Spitzer* vs. *Superior Court,* 74 Cal. App. 494, 241 Pac. 270-272, the Court stated:

> "It is also the rule that the Court in which an action is pending wherein it has jurisdiction of the parties and the cause, is not deprived of jurisdiction to hear and determine the cause by the fact that a decree of another Court adjudging dissolution of the marriage has become final during the pendency of such action."

Ross vs. Ross, 79 Fed. Supp., 716.

In this case there was no pretense of litigating in the Florida Court the property rights involved in the Kentucky litigation. The cases were prepared and practiced on the tacit, if not express, agreement that the divorce action would be tried in Florida and the alimony and property rights adjudicated in the Kentucky case. The opinion on the first appeal makes this clear, and the record in support of that conclusion of the Court is incontestable.

This constituted not only a reservation of the questions now presented, in this Court, but manifested a proper respect by the Florida Court for the authority and jurisdiction of the Kentucky Court of Appeals on the first appeal.

It is the law of Kentucky and of Florida that a divorce does not preclude the granting of alimony accrued when it has been reserved expressly in the decree of divorce, or by facts and circumstances equivalent to an express reservation.

Wallace vs. Wallace, 218 Ky. 212, 291 S.W. 42;

Lyon vs. Lyon, 243 Ky. 236, 47 S.W. (2d) 1072;
Dodd vs. Dodd, 278 Ky. 662,, 129 S.W. (2d) 166;
Hanks vs. Hanks, 282 Ky. 236, 138 S.W. (2d) 362;
Hyman vs. Hyman, 149 Fla. 530, 6 So. (2d) 535;
Cowan vs. Cowan, 147 Fla. 473, 2 So. (2d) 869.

III.

"A review of writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor" (Rules of Supreme Court, 38-5). No new question is presented.

The parties began their married life in 1921 without property. The evidence in this case shows that by thrift and energy the parties accumulated an estate of the value of at least $250,000. It was all in Cooper's name, including Mrs. Cooper's home which she had conveyed to him just before he deserted her. He took another man's wife and located in Florida. After both had obtained divorces, Cooper married her. The Court of Appeals reduced the judgment of the Circuit Court from $125,000 and the home to a mere $35,000 with only a life estate in the home.

The Court of Appeals of Kentucky gave long and patient consideration to the case and fully respected the Florida decree as fixing the marital status. It was not entitled to the consequential effect of ousting the Kentucky Court of Jurisdiction to determine the property rights of Mrs. Cooper, accrued when Cooper deserted her for another woman. The Kentucky Court carefully followed the decisions of this Court. Cooper not only left his wife penniless, but he wrecked her health. In doing so, he broke up two families, and then slandered and abused his wife shamelessly. In view

of the decisions of this Court, and of the Kentucky and Florfida Courts, there is no sound basis for a further review of this record. For over eight years Cooper has harassed, hounded and injured this innocent woman, and it is time to end the struggle.

Wherefore, it is respectfully submitted, the petition for a Writ of Certiorari should be denied.

WILLIAM ERNEST FAULKNER,
SIMEON S. WILLIS,

Counsel for Respondent.

Ashland, Kentucky,
October 6, 1952.

OCT

No. 355

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

CLAUDE VERNON COOPER - - - *Petitioner*

vs.

ELIZABETH D. COOPER - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

REPLY BRIEF FOR PETITIONER

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